

OGC 73-1166

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OGC Has Reviewed

25 June 1973

MEMORANDUM FOR:

STATINTL

SUBJECT:

Employee Claim for Reimbursement
of Loss Incident to Official Duties Overseas in 1961

1. The employee's remedy for a loss of personal property incident to official duties overseas in 1961 was by appeal to Congress for a private bill. There was no statutory waiver of sovereign immunity in 1961 to cover this situation so as to facilitate an action at law. (The Federal Tort Claims Act excludes actions which arise in foreign countries. 28 U.S.C.A. § 2680(k).) Today the situation is covered by the "Military and Civilian Employees' Claim Act of 1964." 31 U.S.C.A. § 240-242. Under this law a claim such as the instant one must be presented in writing within two years after it accrues. 31 U.S.C.A. § 241(c)(1).
2. The facts as known to me clearly indicate that the employee long ago abandoned her claim. The equitable doctrine laches should now preclude recovery.
3. For the purpose of examining the equities of the situation and assuming arguendo that the U.S. had somehow waived sovereign immunity, the employee may have only a very narrow technical ground for maintaining an action in tort today. If the employee proceeds on an action in contract, i.e., the Agency breached an implied contractual obligation, the action will certainly fail. The statute of limitations regarding actions on the contract is six years after the right of action first accrued. 28 U.S.C.A. § 2401(a).
4. However, if the employee were to successfully maintain that the circumstances surrounding the loss were such as to create a condition of bailment which the Agency as bailor breached, she may, on a narrow technical ground, still have a right of action.

5. The courts have extended tort liability for misfeasance to virtually every type of contract where defective performance injures the promisee. The principle which seems to have emerged from the decisions is that there will be liability in tort for misfeasance whenever such involves a foreseeable, unreasonable risk of loss to the interests of the plaintiff. Moreover, the courts are quite liberal in allowing a plaintiff to elect between an action in contract or tort where the point at issue (here the survivability of the action re the statute of limitations) affects the suit or procedure and not the merits, particularly where the damage was to plaintiff's property. See Prosser, Law of Torts, § 93 (3d ed. 1964).

6. The general statute of limitations for tort claims against the U.S. Government is found at 28 U.S.C.A. § 2401(b). Provisions applicable to a cause of action accruing in 1961 (the statute was amended in 1966) are as follows:

"A tort claim against the United States shall be forever barred... if it is a claim not exceeding \$2,500, unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues.... If a claim not exceeding \$2,500 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

7. If the employee filed a written claim with her supervisor, administrative officer or other appropriate official, she probably complied with the statutory requirement for initiating the action. See Note 7 to 28 U.S.C.A. § 2401. It should be noted that to raise the defense of the statute of limitations, the burden is on the United States to demonstrate that no claim was filed. Note 7 to 28 U.S.C.A. § 2401. If there was no claim in writing, any action is clearly barred. If there was a written claim, an appropriate agency official must have conveyed to the claimant in writing that the

claim was denied; otherwise, the running of the statute was technically suspended until a final disposition was made. See Note 12 to 28 U.S.C.A. § 2401.

8. The purpose of § 2401 is to protect defendants against stale and unjust claims. Note 3 to 28 U.S.C.A. § 2401. From the facts presently available to me, the claim certainly appears stale but perhaps not unjust. However, the time limitation of § 2401 is an indispensable condition of liability, whether limitation is pleaded or not. Note 25 to 28 U.S.C.A. § 2401. At the end of the two-year period, the remedy is not merely barred, but is destroyed. Note 31 to 28 U.S.C.A. § 2401.

9. If the merits of the employee's claim were reached by an appropriate official at the time of the original claim, there seems no good reason, save security, to benevolently allow the claim at this time. In fact there is good reason not to. As to security considerations, it should be recognized that an employee who is forceably retired may be bitter and the risk of disclosure of a sensitive operation must be considered, particularly in light of the minimal legal avenues of control at the Agency's disposal to prevent or punish leaks of classified information.

10. I should call to your attention Title A § 5.1(4) of GAO procedures which requires that claims that appear to be barred by an applicable statute of limitations be submitted to the Claims Division of GAO. [REDACTED] ATINTL

Office of General Counsel

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Distribution:

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